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IN THE

Supreme Court of the United States

No. 815

JAY E. DARLINGTON,

Petitioner,

vs.

STUDEBAKER-PACKARD CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
For the Seventh Circuit

(Opinion below is Appended Hereto)

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To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

The above named Petitioner respectfully petitions this Court to issue its writ of certiorari to said Court of Appeals, to review the latter's decision reported in:

Darlington v. *Studebaker-Packard Corporation* (7 Cir. Jan. 2, 1959) 261 F. 2d 903.

There are no published opinions of the District Court in this case, but two short opinion-orders are contained in the Record Appendix, pages 50a-51a.

Grounds for Invoking This Court's Jurisdiction.

The Court of Appeals rendered and entered its opinion and judgment of affirmance against petitioner, plaintiff-appellant in this civil action, on January 2, 1958 (see Appendix of this petition). This Petition is filed ninety days thereafter, invoking this Court's general jurisdiction to review final judgments of Courts of Appeals under 28 U.S.C. 1254(1).

Questions Presented for Review.

The merits of petitioner's civil action as plaintiff in the District Court are not here involved. Petitioner seeks this Court's review of the Court of Appeals' affirmance following orders and judgment of the District Court:

(1)

The District Court made an *automatic* dismissal of petitioner's action under its *local Rule 11*, following which it denied his verified motion to vacate the dismissal. This final judgment, affirmed by the Court of Appeals, was challenged below, and is challenged here on the grounds:

(a) Local Rule 11 is invalid because it is *"inconsistent"* with the Supreme Court's *Rule 41(b) of Civil Procedure*, and hence is beyond the District Court's rule making power granted by Rule 83 of Civil Procedure. Hence, the judgment of dismissal and refusal to vacate the dismissal, *predicated solely* upon local Rule 11, constituted *a mal-administration of justice* in the District Court and a violation of petitioner's right of due process under the *Fifth Amendment.*

(b) Even if local Rule 11 be valid, it was an abuse of discretion to refuse to vacate the dismissal under the fact situation disclosed in petitioner's motion to vacate and in the preceding record.

(2)

The District Judge (Hon. Robert A. Grant, N.D. Ind.) denied petitioner's verified motion for him to disqualify himself because of the Judge's prior connection with defendant-respondent, making it improper for him to sit in the case (*28 U.S.C. 455*, Record Append. 42(a), 43(a), 45(a). The motion also alleged that the Judge was disqualified because of bias and prejudice against petitioner's case, under the related section, *28 U.S.C. 144*, Record Append. 44(a). The Judge's order refusing to disqualify himself was affirmed by the Court of Appeals (Appendix of this petition, p. 6a).

Petitioner urges here, that under the facts disclosed in the Record Appendix and on the face of the Court of Appeals' opinion, this order was erroneous, resulting in a *maladministration of justice* in the District Court, which constituted a denial of his right of due process under the *Fifth Amendment*.

The above questions (1)(a) and 2 go to alleged maladministration of justice and denial of petitioner's right under the Fifth Amendment, and hence, we think, they merit this Court's attention.

If question (1)(a) is determined in favor of petitioner, this would suffice to require reversal, though it would be within this Court's power also to consider 2 if it deemed this advisable for the purpose of clarifying the Judge's future status in the case.

Similarly, a determination of question 2 in petitioner's favor would require a reversal without the need of determining (1)(a) or (b), though a determination of (1) would be within the court's power and probably desirable for future guidance of the lower courts in the case.

Rules Involved in Question (1) (a):

District Court's Local Rule 11:

"Dismissal of Civil Cases Because of Lack of Prosecution. Civil cases in which no action has been taken for a period of one year *may* be dismissed *for want of prosecution* with judgment for costs after thirty days notice *given by the clerk* to the attorneys of record *unless*, for good cause shown, the court orders otherwise." (Our emphasis).

Rule 11, U.S. District Court (N.D. Ind.) 1955 Edition.

Applicable Rules of Civil Procedure.

"*Rule 83. Rules by District Courts.*

"Each district court by action of a majority of the judges thereof may from time to time made and amend rules governing *its* practice not *inconsistent* with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases *not provided for* by rule, the district courts may regulate their practice in any manner *not inconsistent* with these rules." (Our emphasis).

Commentaries

* * * * *

"The intention of the Committee was to provide a simple, *unified* system which would be governed by a *single*, brief body of rules. The Federal Rules of Civil Procedure do not, however, cover all situations. *To the extent* that the new rules, together with the federal statutes, *do not regulate the practice* and pro-

cedure, the district courts are permitted to formulate their own rules. * * * Daniel H. Hopkinson, *23 Marq. L. Rev. 159.*" (Our emphasis).

Rule 83, Federal Rules of Civil Procedure and Commentaries, 28 U.S.C.A. pp. 504-505.

Rule 41. Dismissal of Actions.

(*a*) *Voluntary Dismissal: Effect Thereof.*

"(1) *By Plaintiff: By stipulation.* Subject to the provisions of Rule 23 (c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff *without order* of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim. As amended Dec. 27, 1946, effective March 19, 1948.

"(2) *By Order of Court. Except* as provided in paragraph (1) of this subdivision of this rule, an action *shall not be dismissed* at the plaintiff's instance *save upon order* of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can

remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) *Involuntary Dismissal: Effect Thereof.*

"*For* failure of the plaintiff *to prosecute or* to comply with *these* rules or *any order* of court, *a defendant may move* for dismissal of an action or of any claim against him. * * * Unless the court in its *order* for dismissal otherwise specifies, a dismissal under *this* subdivision and *any* dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an *adjudication* upon the *merits*. As Amended Dec. 27, 1946, effective March 19, 1948." (Our emphasis).

Rule 41 of Civil Procedure, 28 U.S.C.A., pp. 203-204.

Rule Involved Under Question 1(b):

Rule 60. Relief from Judgment or Order.

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* "On *motion* and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, *order,* or proceeding for the following reasons: (1) *mistake, inadvertence,* surprise, or *excusable neglect;* * * * (4) the judgment is *void;* * * * or (6) *any other reason* justifying relief from the operation of the judgment. The motion shall be made within a *reasonable* time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. * * *" (Time was enlarged from six months to one year by 1946 amendment).

Rule 60(b) of Civil Procedure, 28 U.S.C.A., pp. 310-313.

Statutes Involved in Question (2):

§455. *Interest of justice or judge.*

"Any justice or judge of the United States *shall disqualify* himself in *any* case in which he has a substantial interest, has been of counsel, is or has been a material witness, *or* is so related to or connected with any party or his attorney as to render it *improper,* in his opinion, for him to sit on the trial, appeal, or other proceeding therein." June 25, 1948, c. 646, 62 Stat. 908 (Our emphasis).

28 U.S.C. 455.

§144. *Bias or prejudice of judge.*

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith." June 25, 1948, c. 646, 62 Stat. 898, as amended May 24, 1949, c. 139, §65, 63 Stat. 99.

28 U.S.C. 144.

STATEMENT OF FACTS.

Action by plaintiff-appellant for accounting for profits and damages for alleged patent infringement. Case was dismissed before trial, for alleged delay in prosecution, *solely under Local Rule 11*, from which plaintiff appeals.

Since the complaint was not dismissed on the merits, or disposed of in any fashion on the merits, it does not appear necessary to summarize here at length the contents of the pleadings, except for the incidental purpose of showing the nature and size of the case as bearing upon some aspects of the delay in prosecution.

Complaint.

Filed December 31, 1952. Alleges that defendant, The Studebaker Corporation, has infringed a design patent issued on June 14, 1949 to Tucker Corporation and assigned by the latter's trustee to the plaintiff pursuant to order of United States District Court (N.D. Ill.).

Prayer for accounting for profits and damages arising from the infringement.

Record Appendix, p. 1a.

Answer.

Filed February 20, 1953, after stipulated extension of time. Admits that the patent issued but denies the alleged infringement, and alleges that the patent is invalid for lack of invention and that the same design was covered in a large number of specified patents and publications in this country and foreign countries.

Record Appendix, pp. 3-8a.

The next step in the case was a Clerk's entry on September 1, 1953 reciting that the case was placed on the trial call calendar for the October 1953 term, "*and no request for trial was received.*"

Record Appendix, p. 8a.

Substitution of New Defendant and Counsel.

No further action occurred in the case until March 4, 1955 when an order was entered substituting the defendant's successor, Studebaker Packard Corporation, as the defendant.

This was followed on June 9 and 23, 1955 by an order and entry substituting a completely new set of defense counsel.

Record Appendix, pp. 8-10a.

Defendant's Interrogatories and Requests for Admissions.

No further action occurred in the case until, January 20, 1956, when the defendant filed 20 interrogatories and 101 requests for admissions, directed to the plaintiff, the two documents being very long and involved.

Record Appendix, pp. 10-28a.

On April 23, 1956, time having been extended (Tr. 63-74), plaintiff filed answers and responses to these interrogatories and requests.

Record Appendix, pp. 28-35a.

Clerk's Notice Under Local Rule 11.

The next action in the case was a mimeographed form notice sent on May 2, 1957 by the Clerk to the parties (Tr. 82):

"You are hereby notified that this cause *will* be dismissed on Thursday, June 6, 1957, pursuant to Rule 11 of this court, *unless prior thereto,* for good cause shown, the court *orders otherwise.* (Our italics).

/s/ Kenneth Lackey, Clerk"

Record Appendix, p. 36a.

The text of Local Rule 11, similar to the above language, is set out at page 4 *supra.*

Dismissal Order.

On June 6, 1957 an order, *apparently automatic* and without the presence of either side, was entered, which reads:

"*Pursuant to notice given under Rule 11* of the Rules of this Court, cause dismissed for failure to prosecute at the costs of the plaintiff. (Our italics)

/s/ W. Lynn Parkinson, Judge"

Record Appendix, p. 37a.

Motion to Vacate Dismissal.

On June 21, 1957, plaintiff filed his verified motion to vacate the dismissal under Rule 60 (b) of Civil Procedure, alleging facts to show the impossibility of complying with Local Rule 11 at an earlier date. This motion is discussed at more length under pages 19-20, *infra.*

Record Appendix, pp. 38-40a.

Hearing and Denial of Motion to Vacate.

In the latter part of 1957, after the entry of the aforesaid dismissal order and filing of the motion to vacate it, and before the motion came on for hearing, the Judge who entered the dismissal order, Hon. W. Lynn Parkinson, was appointed to the United States Court of Appeals for the Seventh Circuit, and was succeeded as District Judge by Hon. Robert A. Grant.

The motions to vacate was heard by Judge Grant on oral arguments on March 14, 1958, with time given to April 14 for plaintiff to file any desired memorandum of authorities and defendant given until May 5 to file any reply memorandum of authorities.

Record Appendix, p. 41a.

An order was entered by Judge Grant on May 9, 1958 denying plaintiff's motion to vacate the dismissal.

Record Appendix, p. 51a.

Plaintiff's Motion for Judge to Disqualify Himself, and Order Overruling Same.

On April 14, 1958, during the interval between the aforesaid oral argument on March 14 and the order denying the motion to vacate the dismissal on May 9, the plaintiff filed a verified motion requesting said Hon. Robert A. Grant to disqualify himself to rule upon the pending motion and at future stages of the case, under 28 U.S.C.A. 455, because of the Judge's previous employment by the defendant, which fact first came to plaintiff's knowledge after the oral argument of May 14. This subject is covered in more detail under part II of the Argument, p. 22, *infra*.

Record Appendix, pp. 42-46a.

The defendant, in Part III of its brief, filed on April 23, 1958, admitted the alleged employment of the Judge before his appointment to the bench, but argued that this was insufficient to disqualify him. (No other factual response was filed to plaintiff's motion. The "brief" was not verified.)

Record Appendix, pp. 47-50a.

On May 8, 1958 (the day preceding the aforesaid denial of the motion to vacate the dismissal), the Judge

entered an order overruling the motion for him to disqualify himself. The order, in language of 28 U.S.C.A. 455, categorically denies the statutory causes for disqualification, with no factual amplification.

Record Appendix, p. 50a.

Appeal.

Notice of appeal was filed on June 7, 1958, from both of the above orders,—the order of May 8 overruling plaintiff's motion for disqualification, and the order of May 9 denying plaintiff's motion to vacate the dismissal.

Record Appendix, p. 52a.

REASONS FOR ALLOWANCE OF WRIT.

Summary.

I.

The District Court erred in denying plaintiff's Motion to Vacate the Dismissal Order.

A.

Local Rule 11, which was the *sole* actual *basis* of the dismissal, was and is invalid because it is "inconsistent" with the Supreme Court's *Rule 41(b) of Civil Procedure*. It was beyond the local rule-making power granted by the Supreme Court to the District Courts under *Rule 83 of Civil Procedure*.

We find no reported decision construing or deciding the validity of Local Rule 11, but basic principles, as well as decisions on the analogous question of abatement, seem to sustain our position:

Messenger v. *United States* (2 Cir. 1956) 231 F. 2d 328, 329, point 1).

Hackner v. *Guaranty Trust Co. of N. Y.* (2 Cir. 1941) 117 F. 2d 95, 99.

The question here is not the general power of District Courts to dismiss for delay in prosecution outside of Rule 41(b) of Civil Procedure. The question is the validity of Local Rule 11 as it was applied in this case.

B.

If Local Rule 11 was valid, the District Court nevertheless abused its discretion in refusing to vacate the dismissal.

Langnes v. *Green*, 282 U.S. 531, 541-2, 51 S. Ct. 243.

Note: If the above point A is well taken, it disposes of the appeal and renders point B moot.

If either point A or point B are well taken, they dispose of the only final judgment presently existing in the case, the appeal and renders point II moot.

II.

The District Judge erred in overruling plaintiff's motion requesting him to disqualify himself.

28 USC 455.
28 USC 144.

ARGUMENT.

I.

Error in Denying Plaintiff's Motion to Vacate Dismissal.

A.

Invalidity of Local Rule 11.

For texts of Rule 11 and applicable Rules of Civil Procedure, see pages 4-6, *supra*.

As appears on the face of the above *Rule 83 and Commentaries* the Supreme Court's purpose was a simple,

unified, uniform system of Civil Procedure. The only field left to the District Court's rule making power was in matters "not inconsistent" with, or "not provided for" in the Rules of Civil Procedure.

The purpose and logic of the situation appears to be that *general* procedural problems which are *common* to the various Districts should be governed by the Rules of Civil Procedure. The only *need* for local rules is to cover *local* problems, and even in this field the District Courts are circumscribed by the "not inconsistent" requirement of Rule 83.

The entire subject of dismissal of civil actions, voluntary and involuntary, including dismissal "for failure of the plaintiff to prosecute", is covered in Rule 41 of Civil Procedure. Quoted at page 5, *supra*.

Comparison of Rule 41(b) with Local Rule 11.

Since it is fundamental that appellate courts deal with *the actual, concrete situation* presented in the record coming up from below, and they refuse to decide "might have been" questions which are not required for disposal of the appeal,—the actual question here is whether Local Rule 11 *as applied* in this case was invalid, (though if required for disposal of the appeal, we contend, and we think it is plain, that Local Rule 11 is basically and totally invalid).

Although Local Rule 11 says the case "may" be dismissed, the *actual practice* under the rule apparently was for the *Clerk* to go through the docket and send out mimeographed notices (Tr. 82a) that cases "will" be dismissed under Local Rule 11.

Record Appendix, p. 36a.

The order of dismissal also shows on its face that it was an *automatic* type of order, entered *without motion*

of any part without the *presence* of any party,—and what is more important, without the Judge having or taking the opportunity to perform the important judicial function of considering the *nature, progress* and *status* of the case,—matters which could adequately become known to the Judge only upon a *motion* of the defendant to dismiss, or upon a pre-trial conference,—neither of which ever occurred in this case, as shown by the complete record which was designated and certified up.

Also, in approaching this comparison of *Rule 41(b)* and Local Rule 11, we believe it is logical and important to bear in mind that:

(a) The limit which *Rule 83* places on local rule-making power is that the latter be "not inconsistent". They need not be in head-on collision with the Rules of Civil Procedure.

(b) Inconsistency can, and often does, exist not so much in violating the letter but the general scope and tenor of the superior document.

(c) The rights of a litigant are defined (and protected) not only by what the Rules of Civil Procedure require, but what they do *not* require of a litigant. This cautionary feature is many times stated in these Rules. It is implicit in all of them, including Rule 41(b).

We respectfully urge that, tested by these standards and by all accepted standards, Local Rule 11, as applied in this case, is "inconsistent" with Rule 41(b) and with the general body of the Rules of Civil Procedure in obvious, fundamental respects, including the following:

(1)

It contemplated, and produced, an arbitrary automatic dismissal, *based upon an arbitrary period of one year,* without regard to the *nature, progress* or *status* of the case.

A reference to these factors would have shown that the case was a large and complicated one, wherein both the *court* and the *defendant* had allowed long periods to elapse without protest or invoking Local Rule 11, far exceeding the one year and two weeks of "delay" for which the plaintiff was arbitrarily thrown out of court.

This Petition, *supra*.

Record Appendix, pp. 3-9, 28, 36a.

On the other hand, *Rule 41(b) does* not fix any arbitrary *period* standard, nor any such *automatic* dismissal.

(2)

Under Local Rule 11, as applied here, the moving party was the District Court's *Clerk*, whereas, under *Rule 41(b)*, the motion must come from the *defendant* or a like party, (as such an initiative should come, unless we are to convert the federal courts into arbitrary assembly lines or transmission belts).

This procedure, plainly specified by Rule 41(b), obviates the evils above mentioned under (1).

While we find no precedent in point on this conflict between Local Rule 11 and Rule 41(b), we find many cases which *take it for granted* that the dismissal procedure is controlled by Rule 41(b), and also the following dealing with the analogous subject of conflict between local rules and the Rules of Civil Procedure regarding *abatement* of actions:

> "After the adoption of the Rules, *some* of the *District* Courts adopted rules providing that actions *should abate* unless service be completed within a *specified time* after filing the complaint. *Cf. Koster* v. *(American) Lumbermens Mut. Casualty Co.*, 2 Cir., 153 F. 2d 888. But in *Hackner* v. *Guaranty Trust Co.*

of New York, 2 Cir., 117 F. 2d 95, 96, *we questioned the validity of such rules.* That question it is not necessary now to decide since no such rule has been invoked in this case. However, the cases just cited hold that after the filing of the complaint, *the action remains pending in an inchoate state* until service is completed unless *and until* the action is dismissed for failure to prosecute *under Rule 41(b)*. The same holding is implicit in *Munro* v. *United States*, 303 U.S. 36, 58 S.Ct. 421, 82 L. Ed. 633, and *Bates Mfg. Co.* v. *United States*, 303 U.S. 567, 58 S.Ct. 694, 82 L. Ed. 1020.

* * *

"Holding, as we do, that service on the United States was never accomplished, clearly the court below was warranted in dismissing for failure to prosecute *under Rule 41(b)*. For some six years there has been a complete lack of any prosecutory effort; not even service of the action has been accomplished. *Under Rule 41(b)*, a motion to dismiss may be granted for lack of *reasonable* diligence in prosecuting. * * *"

Messenger v. United States (2 Cir. 1956) 231 F. 2d 328, 329, 330-331.

"* * * Now under the *rules* an action once commenced by the filing of a complaint—which is what Eastman's 'amendment' amounted to—*remains pending until dismissed by the court* under *Rule 41(b)* for lack of due diligence in prosecution. *Cf. Bates Mfg. Co.* v. *United States*, 303 U.S. 567, 572, 58 S. Ct. 694, 82 L.Ed. 1020; 51 Harv. L. Rev. 1087; *Linn & Lane Timber Co.* v. *United States*, 236 U.S. 574, 578, 35 S.Ct. 440, 59 L.Ed. 725; *Genesee Valley Trust Co. of Rochester* v. *United States*, 2 Cir., 116 F. 2d 407, December 23, 1940." (Our emphasis.)

Hackner, v. Guaranty Trust Co. of New York (2 Cir. 1941) 117 F. 2d 95, 99.

Opposing cases distinguished:

Some cases, including one or two cited in the order denying the motion to vacate dismissal, refer to the "inherent power" of a District Court to dismiss for lack of prosecution. None of them involve a comparable fact situation. They were cases where the plaintiff was grossly in default or was purposely dallying with a frivolous complaint. Moreover, in most instances, the District Court acted upon an existing or preceding motion of the defendant for relief from the plaintiff's misconduct (there never was any such motion in the case at bar).

So the situation in those cases was appropriate for application of *Rule 41(b)*, though dismissal was predicated loosely upon "inherent power," an expression which, if not confined to the facts in the cases, obviously collides with the letter and purpose of *Rule 83 of Civil Procedure.*

Hicks v. *Bekins etc. Co.* (9 Cir. 1940), 115 F. 2d 406, the only case cited in the Court of Appeal's opinion on the "inherent power" doctrine, bases itself on *Blackstone,* plus one Second Circuit decision which preceded the recent revisions of the Rules of Civil Procedure, and which is contrary in effect to later decisions of the Second Circuit, quoted *supra.*

Further, the dismissal in our case was predicated expressly and solely upon Local Rule 11, so there is not now before this Court any questions as to the existence or scope of the District Court's "inherent power" of dismissal.

In fact, the "inherent power" doctrine implies that the District Court applies judicial consideration to each individual case, which is the antithesis of the one-year automatic dismissal practice applied in this case.

B.

If Local Rule 11 was valid, it was nevertheless an abuse of discretion to refuse to vacate the dismissal under the fact situation shown in plaintiff's Motion to Vacate the Dismissal.

Rule 60 (b) of Civil Procedure provides a comprehensive, flexible, liberal procedure for relief from all kinds of judgments and orders. Its more applicable provisions are:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, *order*, or proceeding for the following reasons: (1) *mistake, inadvertence,* surprise, or *excusable neglect;* * * * (4) the judgment is *void;* * * * or (6) *any other reason* justifying relief from the operation of the judgment. The motion shall be made within a *reasonable* time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. * * *" (Time was enlarged from six months to one year by 1946 amendment).
>
> **Rule 60(b) of Civil Procedure, 28 U.S.C.A., pp. 310-313.**

Obviously, the above Rule affords ample procedural basis for granting us relief either on the theory that the District Court committed a mistake in dismissing the case under an invalid Local Rule, so that the dismissal was perhaps void or certainly erroneous, as contended in Point A, *supra*; or on the theory that the plaintiff committed a mistake, inadvertence or excusable neglect, as contended in the present Point B.

While the Motion to Vacate the Dismissal deals only with the *factual* grounds covered in Point B, because it was prepared in haste before the plaintiff had an opportunity to study the *law* question as to the invalidity of

Local Rule 11,—a question of the latter type requires no formal pleading, and this law question was in fact *argued orally* at the hearing of March 14, 1958 and in subsequent briefs of both sides, and the question was entertained by Judge Grant,—in fact it was the only question he would listen to. (See Record Appendix, middle of page 4a).

On the question presented by the present Point B,—mistake, inadvertence or excusable neglect of a party or attorney,—it is inherently impossible to lay down any hard and fast boundaries, and no two fact situations are alike, so precedents are not controlling one way or the other.

The standard of sound judicial discretion has been defined by the Supreme Court as—

> "what is right and equitable *under the circumstances* and the law, and directed by the reason and conscience of the Judge to *a just result.*" (Our emphasis).
>
> *Langnes v. Green*, 282 U.S. 531, 541-2, 51 S. Ct. 243.

The motion to vacate the dismissal, filed on June 21, 1957, promptly after the dismissal order of June 6, 1957, made a strong, sworn factual showing that earlier compliance by the plaintiff with Local Rule 11 had not been reasonably possible, and that the dismissal had occurred through mistake, accident and excusable neglect on his part, because, among other things:

> "*Continuously* since January 3, 1957, until the present time, the plaintiff, Jay E. Darlington, an attorney practicing at Hammond, Indiana, has been under a continuous and heavy burden of trial work and matters immediately connected therewith, which could not be avoided or delayed, including principally the case (specifying cases in the District Courts in Chicago,

Miami and Puerto Rico). * * * Due to this situation and the burdens of said other litigation, plaintiff overlooked the requirement of taking action in this case under Rule 11, and if it had not escaped his attention, *it would not have been possible anyhow to take such action within said time*, due to the aforesaid situation of the plaintiff. * * *"

Record Appendix, pp. 38-39a.

There is more factual matter in this Motion to Vacate the Dismissal, for which we respectfully refer the Court to the Appendix, pp. 38-40.

If the plaintiff had been able to prepare and *file* the above showing a few days *before* the dismissal of June 6, 1957, it certainly *should* have sufficed to constitute the undefined "good cause" mentioned in Local Rule 11 (p. 10, *supra*). This would have been true even though the plaintiff's filed response had been held in abeyance and its sufficiency not ruled upon by the Court until May 9, 1958.

Then why should not the same showing filed a few days *after* the dismissal be accepted by the District Court, particularly in view of the showing of inability to file it sooner, plus the fact that the entry sought to be vacated was an automatic formal one involving no hearing and no labor or hardship imposed upon the Court or the defendant.

II.

Error in Judge's Refusal to Disqualify Himself.

The relation of this question to the ones already discussed is this:

If it be determined that Local Rule 11 was valid, and that the Court of Appeals cannot say that the District Court abused its discretion,—then we come to this final question:

Was the plaintiff deprived of his right to have a fair and impartial Judge *exercise* the discretion?

It is no answer to say that the Court of Appeals does not find from the record that the discretion was *abused*.

It is precisely in *discretionary* matters that a totally fair and impartial frame of mind in the District Judge is most *needed* and most important,—to the parties, to the public and to the reviewing courts.

The principal applicable statute is *28 U.S.C.A. 455*, quoted at page 7, *supra*. As shown in the annotations in U.S.C.A., this statute has undergone progressive amendments and clarifications in the direction of disqualifying Judges.

Hence, earlier decisions against disqualification are likely to be out of point.

The factual basis is concisely set forth in the "Plaintiff's Verified Motion for the Judge to Disqualify Himself," to which reference is made to avoid needless repetition here.

Record Appendix, pp. 42-46a.

The only factual response by the defendant to this motion is an admission in its unsworn Brief which considerably strengthens the motion.

Record Appendix, p. 47a, middle.

It is not essential to disqualification to show that the Judge has been counsel in the *case*, or that he has any *direct* connection with a party, as the Court of Appeal's opinion erroneously assumes (page 6a, *supra*). The statute aims at the possible *indirect* sources which *might* bias or influence a Judge. It requires:

"Any judge * * * *shall* disqualify himself in *any* case in which he * * * is * * * so related to *or con-*

nected with any party * * * as to render it *improper*, in his opinion, for him to sit on the trial, appeal, or other proceedings therein."

28 U.S.C.A. 455.

Necessarily, the statute leaves this matter to the Judge's "opinion" in the first instance, and most (not all) Courts of Appeals hold that the matter is not reviewable *until* the case comes up on appeal from a final judgment. But it is universally recognized, we believe, that the matter *is* reviewable,—otherwise the statute would be a mockery.

No factual light or disclosure of facts is contained in the Judge's order overruling the Motion to Disqualify,—only categorical denials couched in the language of the statute.

Plaintiff was entitled to obtain, and we believe this Court ought to have a more complete factual picture of the admitted prior connection between the Judge and the defendant. (Record Appendix, p. 50a).

This apparently was not a routine legal retainer but one of *confidential* and *important nature*, as shown in plaintiff's motion.

Record Appendix, pp. 42-43a.

This feature seems to be circumstantially corroborated by the admission of defendant's counsel that he had not known of the connection prior to reading it in plaintiff's motion.

Record Appendix, p. 47a, middle.

In the light of these undisputed facts, the plaintiff is not bound, and *this Court* is not aided, by the self-serving, conclusory statement in defendant's Brief that the undefined "certain legal matters" in which the present Judge was admittedly acting for the defendant "continuously from July 1950 to the end of 1954" had "no connection whatsoever with the *present case*". (Record Appendix, p. 47a).

The statutory test is not "connected with the present *case*," but "connected with any *party*".

The defendant could have, and we think should have, filed a frank factual response to plaintiff's motion in this unusual situation.

The Judge, while not required to do so, could properly have clarified the factual picture by filing a factual memorandum with his order refusing disqualification. Such factual disclosures are often freely volunteered, usually orally in open court, by Judges when questions arise concerning possible interest or connection of the Judge. No factual disclosure of any kind has ever been made on this subject by the Judge in this case, except the recitals in the order.

Or, the Judge could have ordered the defendant to file an adequate factual response.

The plaintiff's motion showed the need for discovery and prayed discovery of these matters under Rule 34.

Record Appendix, p. 43a, par. 3, and p. 45a, par. 2.

The defendant's Brief, while not itself making any adequate factual disclosure, expressly stated that it "would *have no objections* to any discovery *order* with regard to inspecting defendant's *records* as requested by plaintiff" except that the scope be not too broad and burdensome.

Record Appendix, p. 49a, bottom.

Yet the Court ignored plaintiff's prayer and defendant's consent and simply entered the order refusing disqualification.

In this situation, we believe the only fair and feasible remedy is the doctrine that *facts not disclosed* by the party *or person* having the *power* of disclosure will be assumed to be in favor of the party seeking the disclosure.

Thus aided, or even without such aid, we believe that the facts presented in plaintiff's motion and admitted in defendant's brief, with the fair factual inferences therefrom, clearly entitled the petitioner to have his Motion to Disqualify granted.

This is not a situation where a Judge *merely* sits in judgment where his "former client" is a party, as the Court of Appeals' opinion fallaciously holds upon the sole authority of an old and inapplicable case, *Carr v. Fife* (1894) 156 U.S. 494, 498.

While, as above shown, the statutory test is not the Judge's connection with the case before him, the record raises a strong factual inference that the Judge did have a peculiar, unexplained connection with the subject matter of this action, namely:

1. The complaint charges that from the time this Tucker automobile design patent issued on June 14, 1949 until this action was filed on December 31, 1952, defendant had infringed it in its Studebaker *automobile*.

Record Appendix, p. 1a.

2. Plaintiff-petitioner's "Motion for the Judge to Disqualify Himself" alleged that the Judge's employment by Studebaker *from 1950* to 1954 or 1955 was in a legal or "quasi-legal" capacity, in "procurement or negotiation" of contracts for the defendant to supply motor vehicles including Studebaker *automobiles* to government agencies, and that such contracts resulted from this work by him.

Record Appendix, p. 42a.

3. Defendant's responding brief admitted its employment of the Judge "continuously from July 1950 to the end of 1954". *It does not deny* plaintiff's above factual allegations as to the *nature* of the Judge's work. It merely makes the *conclusory*, self-serving, *unexplained* statement that his work was on "matters having no connection" with this case.

Record Appendix, p. 47a.

4. From these facts, plus the *silence* of the defendant and the Judge as to the actual facts, known only to them, —it seems a fair factual inference that the Judge's work and the result of his work, *included the sale of a number of these infringing Studebaker automobiles* to the government, since the admitted period of his work covered two and a half years of the period of infringement.

Wherefore, for each of the aforesaid reasons, Petitioner respectfully prays that this Court may issue its Writ of Certiorari to review and reverse said decision and judgment of the Court of Appeals, and for all other just and proper relief.

Owen W. Crumpacker,
Attorney for Petitioner.

APPENDIX.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

JAY E. DARLINGTON,
Plaintiff-Appellant,
v.
STUDEBAKER-PACKARD CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

January 2, 1959

Before MAJOR, SCHNACKENBERG and HASTINGS, *Circuit Judges.*

HASTINGS, *Circuit Judge.* On December 31, 1952, Jay E. Darlington, plaintiff-appellant, as assignee of a certain design patent, filed an action against the predecessor of Studebaker-Packard Corporation,[1] defendant-appellee, in the United States District Court for the Northern District of Indiana, South Bend Division, charging infringement of such patent with a prayer for an accounting of profits and damages arising therefrom. Since the chronology of subsequent steps taken in the case below leading to this appeal is important, we list those steps in proper sequence:

(1) On February 20, 1953, defendant filed its answer of admission and denial.

(2) On September 1, 1953, a clerk's entry recited that the case was placed on the trial call calendar for the October 1953 term, "and no request for trial was received."

(3) On March 4, 1955, an order was entered substituting the defendant's successor, Studebaker-Packard Cor-

[1] The Studebaker Corporation.

poration, as defendant, followed by entries on June 9 and 23, 1955, substituting new defense counsel.

(4) On January 20, 1956, defendant filed 20 interrogatories and 101 requests for admission, directed to plaintiff, who, on April 23, 1956, filed his answers and responses thereto.

(5) On May 2, 1957, the following notice was sent to the parties by the Clerk:

> "You are hereby notified that this cause will be dismissed on Thursday, June 6, 1957, pursuant to Rule 11 of this court, unless prior thereto, for good cause shown, the court orders otherwise.
>
> /s/ Kenneth Lackey, Clerk."

(It is undisputed that Darlington's counsel received this notice and that no response was made thereto.)

(6) On June 6, 1957 the action was dismissed under the following order:

> "Pursuant to notice given under Rule 11 of the Rules of this Court, cause dismissed for failure to prosecute at the costs of the plaintiff.
>
> /s/ W. Lynn Parkinson, Judge."

(7) On June 11, 1957, defendant filed its bill of costs and verification thereof.

(8) On June 21, 1957, plaintiff filed his verified "Motion to Vacate Dismissal."

(9) On March 14, 1958, oral argument on the motion to vacate the dismissal was heard by Judge Robert A. Grant (successor to Judge Parkinson on the district bench) and time was given to file briefs.

(10) On April 14, 1958, plaintiff filed his motion for Judge Grant to disqualify himself from ruling on the pending motion and from acting further in the case because of alleged prior employment of him by defendant in other matters.

(11) On April 23, 1958, defendant filed its brief in opposition to both of plaintiff's pending motions, admit-

ting that its predecessor defendant had paid Judge Grant a retainer of $400 per month "to handle certain legal matters having no connection whatsoever with the present case continuously from July 1950 to the end of 1954."

(12) On May 8, 1958, Judge Grant overruled plaintiff's motion that he should disqualify himself under the following order:

> "Plaintiff's Motion For the Judge to Disqualify Himself is hereby overruled, as the present occupant of this bench:
>
> (1) Has no interest in this present action;
>
> (2) has not been of counsel as to this action and has not been a material witness therein;
>
> (3) has not been and is not now, to his knowledge and in his opinion, so connected with any party in this matter, or any attorney herein, as to render it improper for the present occupant of this bench to preside in this matter."

(13) On May 9, 1958, an order was entered denying plaintiff's motion to vacate the order of dismissal.

Plaintiff now appeals from the orders of May 8 and 9, 1958, alleging errors by the district court in the denial of each of his motions for disqualification and to vacate.

Although defendant has not filed a motion to dismiss this appeal, it challenges our jurisdiction to hear the appeal on the ground that it is not from any final decision of the district court pursuant to 28 U.S.C.A. § 1291. However, plaintiff's motion to vacate the order of dismissal was filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., on the ground of mistake, inadvertence, or excusable neglect and for other reasons claimed to justify relief from the dismissal. It is well established that such a motion is addressed to the sound legal discretion of the trial court and courts of appeal have frequently reviewed the exercise of such discretion, holding that the ruling on the motion will not be disturbed upon appeal except for an abuse of this

discretion. *Parker* v. *Checker Taxi Company, Inc.*, 7 Cir., 238 F. 2d 241 (1956); *Jones* v. *Jones*, 7 Cir., 217 F. 2d 239 (1954); *Cole* v. *Fairview Development, Inc.*, 9 Cir., 226 F. 2d 175 (1955); *Stafford* v. *Russell*, 9 Cir., 220 F. 2d 853 (1955); *Weilbacher* v. *J. H. Winchester & Co., Inc.*, 2 Cir., 197 F. 2d 303 (1952); *Cromelin* v. *Markwalter*, 5 Cir., 181 F. 2d 948 (1950). Cases cited by defendant are in applicable for the reason that they do not involve Rule 60(b).

Rule 11 of the district court, under which this action was dismissed, appears in the September 1, 1955 Edition of the rules of that court as follows:

> "Dismissal of Civil Cases Because of Lack of Prosecution. Civil cases in which no action has been taken for a period of one year may be dismissed for want of prosecution with judgment for costs after thirty days notice given by the clerk to the attorneys of record unless, for good cause shown, the court orders otherwise."

Plaintiff asserts that this local Rule 11 is invalid for the reason that it is "inconsistent" with Rule 41 (b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., and is therefore violative of Rule 83, F.R.C.P. Rule 41 (b) provides, among other things, for the dismissal of an action on motion of the defendant for failure of the plaintiff to prosecute. Rule 83 provides for the adoption by the district court of rules governing its practice "not inconsistent" with the federal rules, and that in "all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." Plaintiff's contention is without merit. Local Rule 11 merely provides for the dismissal of an action for want of prosecution by the court on its own motion, and we find no inconsistency therein with Rule 41 (b). Furthermore, it is within the court's inherent power to so dismiss an action without authority of statute or rule. *Hicks* v. *Bekins Moving & Storage Co.*, 9 Cir., 115 F. 2d 406, 408, 409 (1940). We hold local Rule 11 to be valid.

Plaintiff's next contention is that if local Rule 11 is valid, it was nevertheless an abuse of discretion on the

part of the district court to refuse to vacate the dismissal under the fact situation set out in his motion. We have examined this motion and it shows in substance that plaintiff has been a practicing attorney in Hammond, Indiana; that continuously since January 3, 1957, he has been under a continuous and heavy burden of trial work which could not be avoided or delayed, naming a case in each of three federal district courts in Chicago, Illinois, in Miami, Florida and in Puerto Rico; that due to this situation and the burden of other litigation he overlooked the requirement of taking action in this case under Rule 11; that "if it had not escaped his attention it would not have been possible anyhow to take such action within said time, due to the aforesaid situation of the plaintiff"; that, although he had counsel of record, he had taken the responsibility for conducting the litigation and his counsel relied on him to take such action; that he has always intended to prosecute this action to trial but was delayed in so doing because of his heavy professional burden and the great amount of trial preparation necessary in this case, and for the further reason that he did not consider it appropriate to press the action during the past several years while defendant was extricating itself from financial difficulties. We have examined the motion in full and find no showing therein to justify a holding that the district court abused its discretion in denying relief under Rule 60 (b).

We have set out the record of the proceedings in detail and need not comment on its further at length. It is sufficient to repeat that plaintiff filed his action on December 31, 1952 and took no further action in court, except in 1956 with reference to defendant's interrogatories and requests for admissions, until he filed his motion to vacate the order of dismissal on June 21, 1957. It is significant to note that he completely ignored the notice on May 2, 1957 that the cause would be dismissed on June 6, 1957 "unless prior thereto, for good cause shown, the court orders otherwise." Under all the circumstances presented to the district court we hold that it did not abuse its discretion in denying plaintiff's motion to vacate the order of dismissal.

Plaintiff asserts that the district court erred in overruling his motion for the judge to disqualify himself. Since we have held that the order denying relief under Rule 60(b) is a final disposition of the case reviewable by this court, we will also review the action of the district judge in refusing to disqualify himself under 28 U.S.C.A. § 455. This section provides:

> "Any justice or judge of the United States shall disqualify himself in any case in which he * * * is * * * so related to or connected with any party * * * as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

Plaintiff's motion for disqualification charges that Judge Grant, while in the active practice of law in South Bend, Indiana, during a period from about 1950 to about 1954 or 1955, was employed on a salary and expense basis by defendant in connection with the procurement or negotiation of government contracts in Washington, D. C., to supply motor vehicles and other equipment to the military or other governmental agencies, and for that reason cannot be disinterested and impartial in this case. We have set out defendant's admission of the prior employment and Judge Grant's response in his order denying plaintiff's motion. Plaintiff cites no cases supporting his contention that, under the circumstances, the judge acted improperly in refusing to disqualify himself.

There is no claim that Judge Grant was ever of counsel in this case or had any interest in it. The claim is that he was employed as an attorney for defendant for a period of about four years ending at the close of 1954. (He assumed the federal district bench in September, 1957.) Shall a judge, who formerly was an active practicing attorney, feel compelled to disqualify himself from hearing matters in which any of his clients of former years may be parties? This has been answered in *Cox v. Fife*, 156 U.S. 494, 498 (1894), where the Supreme Court of the United States said:

> "* * * the ground of objection was that the judge had been, prior to his appointment, attorney for

some of the defendants on matters not connected with the present case, we do not perceive that he was disqualified from trying the cause. *In such a state of facts, the judge must be permitted to decide for himself whether it was improper for him to sit in the trial of the suit.*" (Our emphasis.)

This is a case involving a matter of judgment to be determined by the judge within his own conscience. We find no error in his refusal to disqualify himself.[2]

The orders appealed from are

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

[2] For an interesting summary of related questions, see *Green* v. *Murphy*, 3 Cir., 259 F. 2d 591 (1958).